

BEFORE THE INDIANA

BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of B.S.,)	
Crown Point Community School Corp.,)	
And Northwest Indiana Special)	Article 7 Hearing No. 1136.99
Education Cooperative)	
)	
Appeal from the Decision of)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

Procedural History

On November 30, 1999, S.S., the Parent of B.S. (the Student), requested the appointment of an Independent Hearing Officer (IHO) to address the issue of the Student's eligibility for special education services. The hearing was requested against the Crown Point Community School Corporation and the Northwest Indiana Special Education Cooperative (hereafter, the School).

Jerry L. Colglazier, Esq., was appointed as IHO on December 1, 1999. By letter dated December 7, 1999, the IHO advised the parties of their respective hearing rights and also advised them of the procedures to be followed in the conduct of the hearing. He also issued a "Notice of Prehearing Conference," which set a prehearing conference for December 15, 1999.

The Notice detailed the issues to be discussed at the prehearing. The prehearing was conducted by telephone on December 15, 1999. The IHO issued a prehearing order shortly thereafter, setting hearing dates, incorporating discussions of hearing rights and procedures, and establishing the issues for hearing, which were:

1. Is the Student eligible for special education and related services?
2. If the Student is eligible for special education and related services, what services and accommodations are appropriate?

The parties jointly moved for an extension of time within which the hearing could be conducted and a written decision rendered. The IHO granted the request by order dated December 21,

1999. A "Notice of Final Hearing" dated that same date, set the matter for hearing beginning on February 7, 2000, with the written decision to be rendered by March 15, 2000. The hearing was conducted over three days, February 7, 8, and 9, 2000. A written decision was rendered on March 15, 2000. The IHO found the student is twelve years of age (d/o/b of March 3, 1988) and is a fifth grade student participating in the general curriculum at the local elementary school. In 1996, while in the first grade, the student was determined eligible for special education for a communication disorder, with the related service of occupational therapy. The special education services for the communication disorder were to improve intelligibility and reduce hypernasality in conversational speech, as well as to enhance visual-motor functioning within the classroom setting. Occupational therapy was designed to address primarily poor handwriting along with fine and gross motor problems. These services continued through the fourth grade. Psychological and educational assessments indicate the Student's overall ability is within the low average range with achievement in the expected range. He does have a weakness in mathematics. Although behavior rating by the Parent suggested attention, social problems, and aggression to be significant concerns, similar rating scales by the teachers did not suggest any areas of concern. Evaluative data do not suggest the presence of a learning disability.

In August of 1997, just before the start of the Student's third grade year, the Vineland Adaptive Behavior Scales was administered to the Parents and the Student's teachers. The teachers did not report any significant concerns. The Mother rated the Student within the mildly mentally handicapped range for communication skills, borderline for socialization, and moderately mentally handicapped for daily living skills, with an adaptive behavior composite within the moderately mentally handicapped range. The Father placed the Student within the average range for socialization and communication, but significantly handicapped in daily living skills. Results from the Woodcock-Johnson Compuscores in reading and math were above grade level. Continued eligibility for special education services for a communication disorder with the related service of occupational therapy were recommended.

The parent obtained an independent psychiatric evaluation in February of 1998. The psychiatrist stated the Student did not meet the criteria for Asperger's Syndrome but may have Pervasive Development Disorder Not Otherwise Specified (PDD/NOS). She recommended continued occupational therapy to assist "sensory integration," adapted physical education, and a continuation of speech therapy. By letter of August 4, 1998, the Parent requested the School evaluate the Student for the possible existence of Pervasive Development Disorder/Autism, as well as the need for occupational and physical therapy. The psychiatrist, in a letter of August 25, 1998, reported that the Student does meet the criteria for Autism based upon the following: (1) orthopedic problems from an early age, with the developmental history at the low side of average; (2) impaired social interactions; (3) lack of awareness of existence of feelings of others; (4) difficulty in social interactions with consequent inappropriate actions; (5) impaired communication skills with peers and lack of ability to attract attention appropriately; (6) speech problems; (7) distress over trivial changes; (8) routines; and (9) limited range of interests.

The School evaluated the Student in September of 1998. Assessments included the Gilliam Autism Rating Scale, the Multidimensional Self-Concept Scale, and observations. A case conference committee was convened in October of 1998. The psychiatrist participated by telephone. Parents and School personnel were at variance regarding the degree of disability of the Student. At the case conference committee, the School reported the Student showed no significant discrepancies in performance as a result of the physical and occupational therapy evaluations, although he does demonstrate inconsistent performance in writing, raising his hand, and taking turns talking. Speech therapy services continued to be recommended. The Student did not meet eight of the 16 criteria for autism.

During the 1998-1999 school year, the Student's fourth grade year, he experienced significant academic and behavioral changes. He had been in gifted classes and was on the honor roll for the first semester. However, near the end of the first semester, behavior problems began to occur, which accelerated in February and March of 1999. The Student refused to do work and his grades plummeted. Some of the behavior was described as "bizarre" and "very, very spontaneous," and included such activities as loud, sustained singing during silent reading; crawling on the floor like animal; growling, barking, and "nipping" at classmates; and choking himself. By the end of the fourth grade, the behaviors had subsided and his academic work had improved. The Student was allowed to complete missed work. The IHO found that, based on the record developed at the hearing, the Student's problems stemmed from difficult personal matters at home and in the community, including physical altercations with his parents, family financial concerns, and disputes with an older brother that resulted in physical harm to the Student and consequent involvement of local public agencies. Also during this period (April of 1999), the Student was subjected to a battery of assessments as a part of a neuropsychological evaluation. The results noted variable attention and motivation problems, which the School had not observed. Intellectual functioning was in the average range; he was at or above grade level in all areas except expressive writing, where written expression was within the borderline-impaired range, manifested by sloppy and disorganized handwriting. The Student has deficits in fine motor coordination, with performance "suggestive" of visual-spatial organizational difficulties rather than problems with memory. Social problem-solving was in the low average range. Parents identified many significant behavioral difficulties. The Student's teacher, although reporting the student was often sad, expressed a desire to die, and did not have many friends, nevertheless did not believe the Student's symptoms were clinically significant. Adaptive behavior skills were in the mildly deficient range. The summary was the Student was of average intellectual functioning with good academic achievement skills with difficulty in social skills.

A case conference committee was scheduled for June of 1999 to discuss the results of the independent evaluation and discuss extended school year (ESY) services. The Student was not found in need of ESY services during the summer of 1999. The Student was referred on June 8, 1999, to the Riley Child Development Center in Indianapolis for an evaluation. The Riley report found the Student to have receptive and language skills in the high average range, with a hypernasal vocal quality, and features consistent with PDD/NOS. The report stated that such "autistic features are likely to be most evident in less structured settings, such as home..." Fine

and gross motor problems were determined to be related to PDD and characteristics of Attention Deficit Hyperactivity Disorder (ADHD).

The Student's case conference committee reconvened in September of 1999 for the purposes of conducting an annual case review, the results of the triennial speech evaluation, and to consider the independent evaluations from Riley and from the neuropsychological evaluation. The consensus of the case conference committee was that the Student was no longer eligible for special education and related services. The Parents requested the Student be evaluated to determine whether he is Other Health Impaired (OHI) due to the ADHD and PDD. The case conference committee reconvened on November 19, 1999, to consider possible eligibility under OHI. The Student's fifth grade teacher reported he was performing at or above average academically; both the occupational and physical therapists reported physical functioning does not interfere with the Student's education; and the teacher for students with OHI and Orthopedic Impairments (OI) did not report deficiencies that would meet eligibility criteria. The Speech-Language Pathologist (SLP) stated that pragmatic language, receptive expressive language, voice and fluency were appropriate and above age equivalent. Pitch, loudness, and resonance were normal. Although the SLP acknowledged the Student's hypernasality, his language is intelligible and easy to understand. The SLP recommended that communication disorder services be discontinued.

The IHO found School personnel were sufficiently apprised of the eligibility criteria under 511 IAC 7-3 *et seq.* ("Article 7"). In addition, the School, in preparation for the hearing, obtained an independent evaluation by an employee of another public school district. The independent evaluator did not believe the Student was eligible for services under any educational or medical diagnosis within the spectrum of autism disorders.

From the above, the IHO concluded the Student was not eligible for special education and related services under any educational or medical diagnosis within the spectrum of autism disorders. In the alternative, the IHO stated that, even should the Student exhibit conditions within the Autism Spectrum Disorder, this is not adversely affecting his educational performance. The IHO also concluded the Student was not eligible under OHI, OI, or communication disorder. The IHO appropriately notified the parties of their administrative appeal rights.

Appeal to the Board of Special Education Appeals

The Petition for Review

The Student on April 17, 2000, filed a timely appeal with the Board of Special Education Appeals. The Student objected to the testimony of the School's independent evaluator because the Parents did not request such an evaluation nor were they informed that such an evaluation was to be performed. The Student urges such testimony be struck from the record and not

considered. The Student also objects that the IHO did not provide sufficient credit to the expertise of the psychiatrist who evaluated the Student.

The Student also challenged the adequacy of certain Findings of Fact that found that services continued for the Student when the Student asserts the services were discontinued. The Student also challenges the finding that by end of the Student's fourth grade year (end of the 1998-1999 school year), the Student's behavior and academic problems were alleviated. The Student also challenges the appropriateness of certain assessment instruments employed by the School and the characterization of the Riley evaluation, which resulted from the request for an independent evaluation by the Parents although the School selected Riley. The Student also challenges the IHO's finding that the Riley evaluation did not address Article 7 criteria for Autism.

The Student also questions the hearing procedures, but the nature of this issue is not sufficiently clear.

School's Response to the Petition for Review

The School on April 19, 2000, timely requested an extension of time to prepare and file a Response to the Petition for Review. The Board of Special Education Appeals (BSEA), granted the request by order dated April 20, 2000, granting the School until the close of business, May 1, 2000, to file its Response. The time frame for reviewing the record and rendering a written decision was accordingly extended to June 1, 2000.

On May 1, 2000, the School filed its Response. As noted in the IHO's written decision, the School had an employee of another Indiana public school district observe the Student. The School represents the employee-witness did not evaluate the Student but, rather, observed the Student in a school setting. The employee-witness was retained to consult with the School regarding the issues in this hearing. The employee-witness reviewed the Student's educational records and performed a "short observation". No written report was prepared. The employee-witness was listed on the School's witness list, and the Parent had the opportunity to cross-examine the witness.

The School disagrees that occupational therapy services were discontinued but does acknowledge a factual error in Finding of Fact No. 4. The School states that this Finding of Fact should read: "Speech language services continued through the fourth grade, while occupational therapy services continued on a consultation basis through the third grade but were discontinued for the fourth grade."

Although the Student objects to certain assessments used by the School, the School argues that the Finding of Fact states the fact that the assessments were used, which is not in dispute. As to the adequacy or appropriateness of such instruments, the School moves to exclude the

documents submitted by the Student with his Petition for Review that were not submitted at the hearing.

The School has no reason to doubt the Parent and Student struggled to complete the make-up assignments at the end of the fourth quarter in the Student's fourth grade year, nevertheless, the fourth grade teacher's statement is accurate that, by June of 1999, the Student's academic and behavioral problems had been alleviated.

To the extent that the Student objects to the credibility or weight accorded certain evaluations or evaluators, this, the School asserts, is within the discretion of the IHO. As to the Riley evaluation, the School maintains that the IHO correctly described the circumstances surrounding the request for the evaluation and the fact the report itself does not address Article 7 criteria.

The School also addressed the hearing procedures anomalies alluded to by the Student. A slight delay was occasioned by the unavailability of the School's board room, a fact that was not communicated to the IHO and the parent although the prehearing order identified this as the hearing site. However, the new site for the hearing was a short distance away. This confusion delayed the hearing for about one-half an hour.

Review by the Board of Special Education Appeals

The BSEA set May 15, 2000, as the date for review of this matter. The BSEA elected to review this without oral argument and without the presence of the parties. The review was scheduled for the offices of the Indiana Department of Education, Room 229, State House, Indianapolis. A "Notice of Review Without Oral Argument" dated May 1, 2000, was mailed to the parties.

On May 15, 2000, all three members of the BSEA appeared at the offices of the Indiana Department of Education. All three members had received previously a complete copy of the hearing record as well as all correspondence and pleadings from the parties regarding this appeal. The review was tape-recorded. A transcript of the review will be prepared and mailed to the representatives of the parties as soon as it is available.

In consideration of the record as a whole, the Petition for Review, and the Response thereto, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board of Special Education Appeals, pursuant to 511 IAC 7-15-6, is charged with the responsibility of reviewing the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-15-5. The Student timely appealed the decision of the IHO. Accordingly, the BSEA has jurisdiction in this matter.
2. Under 511 IAC 7-15-6(k), the BSEA is to review the record as a whole to ensure that the requirements of due process are met. The Student alludes to “confusion” occurring at the beginning of the three-day hearing that delayed the hearing process by one-half hour. The “confusion” resulted from the unavailability of the School’s board room, which had not been communicated to the IHO or the Parent. This was easily resolved. The Student does not state how this delay affected his due process rights, nor does the BSEA find that his due process rights were affected in any way due to this minor delay.
3. The School obtained the services of an outside consultant employed by a different public school district to observe the Student and review his educational records. Although the School asserts this was not an evaluation, the BSEA finds that it was a child-specific process and constitutes an evaluation. In addition, the School granted the outside consultant access to the Student’s educational records without obtaining an order from the IHO under 511 IAC 7-8-1(l)(6) or the written permission of the Parent, as required by 511 IAC 7-8-1(k) and 34 CFR §99.30. The failure to adhere to these procedural requirements is not cured by the listing of the outside consultant on the School’s witness list. Permitting this testimony was error. The only remedy available is to strike from the record the testimony of the School’s outside consultant, which is so ordered. However, the BSEA also notes that this testimony was cumulative and its absence from the record will not otherwise affect the IHO’s ultimate determinations as those are supported by other evidence and testimony in the record.
4. The weight accorded the testimony of a witness is within the discretion of the IHO and will not be disturbed absent a showing of finding that the IHO acted in a matter that was contrary to established procedures, arbitrary or capricious, an abuse of his discretion, arbitrary or capricious, contrary to law, or unsupported by substantial evidence. 511 IAC 7-15-6(k). The record and the IHO’s written decision indicate that the IHO did consider the testimony of the Student’s psychiatrist. No abuse of discretion is evident. The IHO’s determinations will not be disturbed.
5. The Student objects to Finding of Fact No. 4 in the IHO’s written decision. The School acknowledges the Finding of Fact contains some inaccurate information. The BSEA amends Finding of Fact No. 4 to read as follows: “These services continued through the third grade and then became consultative services during the fourth grade.”
6. The Student objects to the IHO’s statement in Finding of Fact No. 8, which reads: “Special education services for communication and OT were continued.” The BSEA, after consideration, amends Finding of Fact No. 8 to read as follows: “Special

education services for communication disorder with consultative services for OT were continued.”

7. The IHO stated in Finding of Fact No. 12 that the Gilliam Autism Rating Scale was utilized in the assessment of the Student. Although the Student objects to the use of this instrument, the IHO was merely stating a fact. Finding of Fact No. 12 will not be disturbed.
8. The School moved to strike from the Student's Petition for Review a document critical of the assessment instrument referenced in Combined Finding of Fact and Conclusion of Law No. 7, supra. The document was not provided at the hearing but could have been. Accordingly, the School's motion to strike this document from the record is granted.
9. The Student objects to the IHO's Finding of Fact No. 15, which recited the testimony of the Student's fourth grade teacher to the effect that the Student's behavior subsided near the end of the 1998-1999 school year and that he was permitted to complete missed classroom assignments. This is an accurate recounting of the teacher's testimony. There is no basis to disturb the IHO's finding in this regard.
10. The Student objects to the IHO's Finding of Fact No. 19, which is in three subparts. This Finding of Fact addresses the assessment obtained from the Riley Child Development Center in Indianapolis. Although the Student is concerned with the record indicating who initiated the referral, the IHO's statement that a referral was made is accurate and will not be disturbed. The IHO also correctly noted that the Riley report did not utilize Article 7 criteria to assessing the presence of an educational disability. The subsequent letters from Riley to this effect were not a part of the initial report. The BSEA finds no reason to disturb the IHO's Finding of Fact No. 19.
11. There being no objections to the IHO's Conclusions of Law, the BSEA hereby adopts same.

ORDERS

In consideration of the foregoing, the BSEA now issues the following Orders:

1. The testimony of the School's outside consultant is struck from the record for the failure of the School to adhere to state and federal procedural requirements that require the obtaining of an order from the IHO or the written permission of the parent before conducting an evaluation and granting access to the Student's educational records.

2. The document submitted by the Student with his Petition for Review, critical of the use of a specific assessment instrument is hereby struck from the record for failure to provide the document at the hearing when such a document could have been provided.
3. The IHO's decision finding the Student not eligible for special education and related services is hereby affirmed, except where amended.
4. Any other motion not specifically addressed by the BSEA is hereby considered denied.

Date: May 15, 2000

/s/ Raymond W. Quist, Ph.D., Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this decision to seek judicial review in a civil court with jurisdiction, as required by I.C. 4-21.5-5-5.